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Nos. 00-1751, 00-1777, 00-1779

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IN THE

Supreme Court of the United States

DR. SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

—v.—

DORIS SIMMONS-HARRIS, *et al.*, and SUE GATTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS SUE GATTON, MARY MURPHY, REVEREND MICHAEL DEBOSE, CHERYL DEBOSE, GLENN ALTSCHULD, AND DEIDRA PEARSON IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Of Counsel:

DAVID J. STROM
555 New Jersey Avenue, N.W.
Washington, D.C. 20001

DONALD J. MOONEY, JR.
600 Vine St., Suite 2800
Cincinnati, Ohio 45202-2409

MARC D. STERN
15 East 84th Street
New York, New York 10028

MARVIN E. FRANKEL
Counsel of Record
JUSTINE A. HARRIS
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Ohio Voucher Program under which tax monies are paid to private elementary schools in Cleveland, a preponderant majority of which are sectarian, violates the Establishment Clause of the First Amendment to the United States Constitution.

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COUNTER-STATEMENT OF THE CASE

The three petitions for certiorari — one by the defendants State Superintendent of Public Instruction, the State of Ohio, and Saundra Berry (collectively the "State") and two by groups of intervening defendants — arise from two actions in the United States District Court for the Northern District of Ohio attacking as unconstitutional Ohio's Pilot Project Scholarship Program (the "Voucher Program" as it has come to be known) (State Pet. App. 3a).[1] As reflected in the relative brevity of the fact statements in all three of the petitions, the facts are for the most part both undisputed and amply recounted in both the findings of the district court and the opinions in the court of appeals. Sparing this Court needless repetition, respondents recount the key facts only briefly.

The Voucher Program, funded from the Ohio treasury, uses public funds to award "scholarships," or vouchers, to Cleveland children to attend private schools located in the Cleveland City School District. Private schools affiliated with a religious group or institution that comply with the statutory requirements may participate in the Program. (State Pet. App. 63a). While the Program invites public school districts adjoining the Cleveland School District to participate, thus far none has chosen to do so. (State Pet. App. 63a). Thus, in the 1999-2000 school year the vast majority (over 82%) of participating schools were in fact sectarian, and over 96% of the participating students were enrolled at religiously affiliated schools. (State Pet. App. 63a-64a).

In a seemingly small but importantly misleading misstatement, the Senel Taylor petition says the State's checks are "made payable to the parents and *disbursed to*

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[1] The State parties' petition is referred to as "State Pet." The Appendix to that petition is referred to as "State Pet. App.," as in the reference here.

them at the schools they designate." (Senel Taylor Pet. 3; emphasis added). Actually the checks are not disbursed to the parents but are mailed directly to the participating schools and only presented to the parents for endorsement to the private, usually sectarian schools. (State Pet. App. 63a).

The district court, following a detailed statement of the facts and the issues, concluded that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Committee for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756 . . . (1973)." (State Pet. App. 123a). Rejecting the contention that *Nyquist* had been divested of force by later decisions of this Court, the district court found the Ohio program unconstitutional and ordered it enjoined. (State Pet. App. 59a-126a). Pending appeal to the Sixth Circuit, this Court (5-4) stayed the injunction. (State Pet. App. 127a).

On December 11, 2000, the Sixth Circuit affirmed the district court, also concluding that the Voucher Program was in all material respects identical to the tuition program struck down in *Nyquist*. (State Pet. App. 1a-33a). On February 28, 2001, the Sixth Circuit denied petitions for rehearing (State Pet. App. 166a-67a), and on March 8, 2001, stayed its mandate pending the filing of petitions for certiorari.

REASONS FOR DENYING THE WRIT

The three disparate petitions for certiorari present varying positions on a subject that may warrant review by this Court at some point, but that presents a dubious and ambiguous occasion for review at this time. The petitioners themselves diverge in their identification of the issue or issues warranting review, as reflected in their differing identification of "conflicts" in lower court decisions. One (the Hanna Perkins petition) incorrectly finds a conflict with the highest courts of three states; a second (the State) finds a conflict only with a 4-2 decision of the Wisconsin Supreme

Court, and is correct in this but then goes on erroneously to find conflicts with decisions of this Court. The Senel Taylor petition adds asserted conflicts with three state courts, mistakenly in at least two instances, and devotes many pages to an extraordinary contention that the district court and the court of appeals were precluded by Ohio Supreme Court dicta from even reaching the Establishment Clause issues the petitions propose to present. None, however, properly recognizes that the Sixth Circuit simply adhered to a principle at the core of this Court's Establishment Clause jurisprudence, namely, that absent any indicia of true private choice, direct public funding of religious activities is unconstitutional. In that light — and given both the divergences among, and errors of law in, the petitions — the three applications comprise a case unsuitable for review.

1. Both the district court and the court of appeals found that this case was squarely controlled by this Court's decision in *Nyquist*. As the Sixth Circuit put it:

> Under both the New York statute in *Nyquist*, as well as the Ohio statute at issue . . . the great majority of schools benefited by these tuition dollars are sectarian. . . . As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes.". . . In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds — the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

(State Pet. App. 25a; internal citations omitted). The court of appeals specifically rejected petitioners' claim that the Voucher Program is a neutral "private choice" program: "When, as here, the government has established a program which does not permit private citizens to direct government

aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated." (State Pet. App. 29a). In so ruling, the Sixth Circuit reaffirmed that the Establishment Clause prohibits using taxpayer money to fund religious activity. "To approve this program," the Sixth Circuit explained, "would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something 'in tension' with the precedents of the Supreme Court." (State Pet. App. 29a) (citing *Mitchell v. Helms*, 530 U.S. 793, 837-38 (2000) (O'Connor, J., concurring)).

Far from presenting a "direct and irreconcilable conflict" with other lower court decisions (Senel Taylor Pet. 12), the Sixth Circuit's holding follows a central tenet of Establishment Clause jurisprudence that has recently been reaffirmed by several lower courts. In *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999), the First Circuit followed *Nyquist*, and, noting that "neutrality is but one 'hallmark of the Establishment Clause,'" held that Maine's exclusion of sectarian schools from its private school financing scheme was justified on the ground that funding such schools would violate the Establishment Clause. *Id.* at 63 (quoting *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 846, 852 (1995) (O'Connor, J., concurring)). The Maine Supreme Court, also following *Nyquist*, had reached the same conclusion in *Bagley v. Raymond School Department*, 728 A.2d 127, 144 (Me.), *cert. denied*, 528 U.S. 947 (1999) (although "the school is chosen by parents, not the State," the court found that "[n]one of the Supreme Court's decisions to date have ever intimated that such direct subsidies of religious schools could survive an Establishment Clause challenge"). More recently, in *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001), the Seventh Circuit invalidated unrestricted cash grants to sectarian schools given for the purpose of reducing the net cost of the schools' data

lines and video links to the Internet. *Id.* at 613 (although grants were given to religious and nonreligious, public and nonpublic, schools alike, "in both *Nyquist* and this case, there are no real restrictions on the use of the grant money by the religious schools") (citing *Nyquist*, 413 U.S. at 774; *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000)).

2. Against this consistent line of decisions following *Nyquist*, the petitions erroneously assert conflicts with decisions of state supreme courts or treat state court dictum as if it could create such a conflict under the rules governing certiorari. Most notably misconceived is the treatment in two of the petitions of dicta of the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) ("*Goff*"), as if such expressions could add plausible grounds for this Court's issuance of the writ of certiorari. In *Goff*, the Supreme Court of Ohio actually held that Ohio's voucher statute was invalid because it violated the single-subject limitation of the *Ohio State Constitution*. *Id.* at 216. Having reached that dispositive and totally adequate state ground for holding the statute unconstitutional, the Ohio Supreme Court saw fit to write out at length its view that the "*Nyquist* holding has been undermined," *id.* at 208, and that, except for an easily correctable defect, the Ohio statute "does not violate the Establishment Clause," *id.* at 207. It should be patent on elementary principles, however, that these pronouncements on the Establishment Clause, when the state court had nullified the state law under the State Constitution, were dicta of the most classically obiter variety. Not only were these dicta unappealable by the plaintiffs, but in acting upon its view that *Nyquist* had been undermined, the Ohio Supreme Court ran afoul of this Court's admonition that lower courts should not "conclude [this Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). There is, in a word, nothing in the Ohio Supreme Court's decision that supports the granting of certiorari in this case.

The Hanna Perkins and the Senel Taylor intervenors, notably not joined by the State petitioners, also assert a conflict between the Sixth Circuit's decision and the 1994 decision of the Vermont Supreme Court in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994). As the State's petition implicitly recognizes (State Pet. at 12-13, n.1), that case, too, does not conflict directly with the decision below. Finding the "very limited" factual record "unfortunate," the Vermont Supreme Court distinguished the school funding at issue there from the tuition program struck down in *Nyquist*. *See* 641 A.2d at 358-59. Among the distinguishing facts were several that also distinguish the Vermont program from the Voucher Program here, including: (i) that Manchester did not "both maintain[ ] an appropriate school and allow[ ] some students to go elsewhere by paying tuition for them," *id.* at 359; and (ii) that "unlike *Nyquist*, there is no indication that the result of [Vermont's] policy will be to send any substantial number of children to sectarian schools," *id.*[2]

Thus, as only the State's petition acknowledges, the Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), presents this Court with the only conflict of any vitality. That conflict is a narrow one, however; the Wisconsin Supreme Court, unlike the Sixth Circuit, found very limited grounds to distinguish the Milwaukee voucher program from the tuition reimbursement

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[2] In 1999, the Vermont Supreme Court held that reimbursing students for tuition paid at sectarian schools violated the compelled support clause of the Vermont Constitution, thereby divesting of any practical force its earlier opinion addressing the propriety of such reimbursement under the Establishment Clause. *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt.), *cert. denied sub. nom. Andrews v. Vermont Dep't of Educ.*, 528 U.S. 1066 (1999).

scheme invalidated in *Nyquist*, and thus from the Cleveland scheme here in issue. This limited conflict is also very possibly temporary.

The Wisconsin Supreme Court concluded that Milwaukee's voucher program was in no way "skewed towards religion" only because it chose to consider the Milwaukee program "in conjunction with existing state educational programs." 578 N.W.2d at 617-18. In distinguishing *Nyquist*, the Wisconsin Court deemed it relevant to consider what choices Milwaukee public school students had under totally different educational programs, noting that public school students may choose from "Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, [and] schools developed for students with exceptional needs." *Id.* at 618 n.16.

But as the district court explained in the present case, this Court has never analyzed the constitutionality of a school aid program by reference to the options available to students under different and entirely separate programs. (State Pet. App. 118-122a). Among other examples, the district court pointed to *Witters*, where "the Court did not concern itself with the full range of possible options that a blind student might have apart from funds received from the program to achieve his or her educational and vocational goals." (State Pet. App. 121a). In *Nyquist* itself, this Court found no occasion to weigh the far larger number of New York public school children (80%) against those (20%) attending private schools and thus eligible to participate in the tuition reimbursement program there in question.

Both in following *Nyquist* and as a matter of principle, the instant decision is in our submission plainly correct. More importantly, it leaves the earlier Wisconsin decision standing quite alone in too broadly defining the scope of the available "choices" open to parents and their children for purposes of judging Establishment Clause challenges to government

support for sectarian schools. Given the chronology and the limited nature of the conflict between the two decisions, and bearing in mind the errors tendered by the petitions, the Court could well conclude that this is a conflict that should await maturation, possible disappearance, and more sharply defined contentions before deciding whether or on what terms certiorari may be warranted.[3]

3. Petitioners also argue that the Sixth Circuit's decision conflicts with prior decisions of this Court. (State Pet. 18-25; Senel Taylor Pet. 16-22; Hanna Perkins Pet. 17-30). Petitioners can advance this claim only on the premise that the Sixth Circuit was incorrect when it held that "[t]his is not the type of case which would fall into the exception to the *Nyquist* rules." (State Pet. App. 27a). The State claims that the Voucher Program is a "public and private 'scholarship' program" within the ambit of *Nyquist*'s footnote 38, 413 U.S. at 782-83 n.38, because it extends "as many tutorial assistance grants to public school students as it does scholarships to private school students," and "permits all suburban Cleveland public schools to participate." (State Pet. 24). The Senel Taylor group also offers as a ground for distinction the fact that under the Voucher Program public schools are invited to participate, but it avoids reference to the supposed benefit of tutorial assistance grants. (Senel Taylor Pet. 16, 19). Finally, the Hanna Perkins intervenors are on their own in asserting that the characteristics of the

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[3] The Senel Taylor intervenors alone assert that the decision here conflicts with *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). (Senel Taylor Pet. 12-13). *Kotterman* involved tax credits for donations of up to $500 to non-profit school tuition organizations. The Arizona Supreme Court distinguished *Nyquist*, concluding that the Arizona credits were in line with the tax deductions at issue in *Mueller v. Allen*, 463 U.S. 388 (1983). 972 P.2d at 612-16.

participating sectarian schools are sufficient to distinguish this case from *Nyquist*. (Hanna Perkins Pet. 28-29). None of these contentions has merit.

The argument from the tutorial assistance program is patently empty. Nobody questions the validity of this $500-maximum grant for tutorial assistance to public school students. Nor do any of the petitions indicate how this separate statutory provision could validate $2,500-maximum grants to sectarian schools. It is not necessary to say that the separate tutorial assistance provision is a facade, though it is tempting to suggest this in light of the futility of the argument mounted upon it. The ostensible invitation to suburban schools is similarly weightless. Not a single suburban school has participated during the five years of the Program. It is difficult to imagine that the Ohio legislature could not have predicted this.

Whatever might have prompted these legislative embellishments, however, they do not begin either to evade or to answer the Establishment Clause issues created by the Voucher Program. As found by the two lower courts, far from coming within the hypothetical *Nyquist* exception, the case here is one in which the schools offered for "choice" by Cleveland parents are in fact 82% sectarian, and over 96% of voucher-supported seats are in sectarian schools. (*See* State Pet. App. 64a). This is a Hobson's choice in pure form.

Unlike *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), here the State is inextricably involved in limiting the pool of choices available; under the Voucher Program, the only schools eligible to participate are virtually all sectarian schools within the city of Cleveland. By contrast, in *Witters* and *Zobrest* the wide choices open were preponderantly nonsectarian. *See Witters*, 474 U.S. at 488 ("[a]id recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian"); *Zobrest*, 509 U.S. at 10 ("By

according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school *only* as a result of the individual parents' private decisions.") (Emphasis added). That is plainly not the case here, where the aid program limits the pool of choices available. As the court of appeals found, in these circumstances, whatever "choice" parents have is constitutionally meaningless: "The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program." (State Pet. App. 28a).

Unlike the others, the Hanna Perkins petition purports to distinguish *Nyquist* by describing conditions that *could have* existed in some of the New York private sectarian schools, as if in *Nyquist* those characteristics actually did exist. (*Compare* Hanna Perkins Pet. 28 *with Nyquist*, 413 U.S. at 767-68: "Qualifying institutions. . . *could be ones* that . . . ." (emphasis added)). While the district court in *Nyquist* adopted a profile of sectarian nonpublic schools that could benefit from the tuition program, this Court noted that the "characteristics of individual schools may vary widely from that profile." 413 U.S. at 767-68. Here, as both the district court and the court of appeals found, the vast majority of the voucher schools are sectarian. The district court concluded that although "[r]eligious characteristics vary from school to school . . . it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App. 64a). The court of appeals affirmed these findings: while "[t]he sectarian schools vary in their religious affiliation and approaches . . . the handbooks and mission statements of these schools reflect that most believe in

interweaving religious beliefs with secular subjects." (State Pet. App. 6a).

It is noteworthy that as shown by some of the very cases petitioners cite[4] for their claims of conflicts, this Court has never departed from the bedrock proposition (affirmed in *Nyquist*, among other decisions) that where, as here, there is no true private choice, grants of public money to religious institutions, with no restrictions upon the uses of such money by the religious recipients, violate the Establishment Clause. In following that basic rule, as did the Seventh Circuit more recently in *Freedom from Religion Foundation v. Bugher, supra*, the Sixth Circuit was simply recalling that there is "no precedent for the use of public funds to finance religious activities." *Rosenberger*, 515 U.S. at 847 (O'Connor J., concurring). In light of this Court's most recent affirmations of that proposition, the State's attempt to characterize the Voucher Program's cash assistance to religious schools as a "non-religious category of benefit," (State Pet. 25) or a "neutral, secular benefit" (State Pet. 19) is unavailing. *See Mitchell*, 530 U.S. at 840 ("we have long been concerned that secular government aid not be diverted to the advancement of religion") (O'Connor, J., concurring). *Cf. Agostini*, 521 U.S. at 228 ("No Title I funds ever reach the coffers of religious schools."). The rule against direct unrestricted cash grants to religious institutions remains the controlling law. *See Mitchell*, 530 U.S. at 837-38 ("the actual diversion of government aid to religious indoctrination is in tension with our precedents") (O'Connor, J., concurring); *Everson*, 330 U.S. at 16 ("[The State] cannot consistently with the 'establishment of religion' clause of the First Amendment

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[4] *Mitchell v. Helms*, 530 U.S 793 (2000) (plurality); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

4. Presumably to show the public importance of the questions they present, all three petitions dwell upon the wretched condition of Cleveland's public schools as an argument for using public money to support private, preponderantly sectarian schools. It is notable, therefore, that not a syllable is expended by any petitioner on the recent decision of Ohio's Supreme Court holding unlawful under the State's Constitution the "vast wealth-based disparities" that have been allowed to exist in Ohio between wealthy and poor districts like Cleveland's. *DeRolph v. State*, 677 N.E.2d 733, 737, *clarified*, 699 N.E. 2d 518 (Ohio 1997). The State itself comes here seeking support of both sectarian and nonsectarian private schools in the face of its own Supreme Court's ruling that it has failed in its

> duty to provide a system which allows its citizens to fully develop their human potential. In such a system, rich and poor people alike are given the opportunity to become educated so they may flourish and our society may progress.

Id. at 741. As against that ideal embodied in their own State Constitution, Ohio's Attorney General and education officials press upon this Court a program of support for private schools in the face of a situation in which, at least as of 1990, "Ohio ranked forty-eighth out of the fifty states in the extent of disparity of revenue and expenditure per pupil." *Id.* at 759 (Douglas, J., concurring).

5. Finally, the petition of Senel Taylor, *et al.*, carries the Ohio Supreme Court's dictum to a lengthy and frivolous extreme. This petition (p. 22, *et seq.*) makes the surprising argument that both the district court and the court of appeals in this case were guilty of "an untenable usurpation" no less when they reached and decided respondents' claim that the Ohio Voucher Program violates the Establishment Clause. It

is said that the Sixth Circuit "disregarded not only the dictates of the Full Faith and Credit Act, but also this Court's admonition that '[f]ederal courts may not employ their own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken.'" (Senel Taylor Pet 23; internal quotation marks and citations omitted). But as both the district court and the court of appeals properly held, there is no basis under Ohio law to conclude that respondents should have been precluded by dictum in the Ohio Supreme Court's decision that, because of its nonbinding nature, could not be appealed. (State Pet. App. 30a-31a, 139a-143a).

CONCLUSION

The petitions for certiorari should be denied.

Dated: June 21, 2001

Respectfully submitted,

MARVIN E. FRANKEL
Counsel of Record
JUSTINE A. HARRIS
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

OF COUNSEL:

DAVID J. STROM
555 New Jersey Avenue, N.W.
Washington, D.C. 20001

DONALD J. MOONEY, JR.
600 Vine St, Suite 2800
Cincinnati, Ohio 45202-2409

MARC D. STERN
15 East 84th Street
New York, New York 10028